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STATE OF MONTANA

## IN THE SUPREME COURT OF THE STATE OF MONTANA

Cause No.: DA-10-0218

GREGORY S. HALL )

Plaintiff and Appellant )

vs. )

DON HALL d/b/a DON HALL BUILDERS, )  
DONNA HALL d/b/a TOWN & COUNTRY )  
PROPERTY MANAGEMENT AND REAL )  
ESTATE, DEBRA CERNICK d/b/a DEBRA'S )  
MONTANA COUNTRY REAL ESTATE also )  
d/b/a MONTANA COUNTRY REAL ESTATE, )  
and JOHN D. HEINLEIN )

Defendants and Appellees )

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## **ARGUMENT IN REPLY TO JOHN D. HEINLEIN'S BRIEF**

### **I. STANDARD OF REVIEW**

HEINLEIN states that GREG HALL argues incorrectly that the Standard of review on motions in limine is *De Novo*. HEINLEIN is wrong. In his Initial Brief, GREG HALL quite correctly stated the standard of review on motions in limine as follows:

On Motions in Limine, as to the Supreme Court reviews the District Court's legal rulings de novo. As to the balance of the ruling, the standard is abuse of discretion. State v. Fuller (Mont. 1996), 276 Mont. 155, 915 P.2d 809, 811, 53 Mont. St. Rep. 325, 326. [See Initial Brief of Appellant, Page 10].

HEINLEIN at best failed to read Appellant's Initial Brief. In any event, his argument on this point is simply incorrect.

### **II. ASBESTOS IN THE HOME**

HEINLEIN suggests that whether Scott Curry would testify that asbestos was in the home at a specific date and time versus whether it had been at the home at the time of inspection "is a distinction without a difference". GREG HALL suggests that this is incorrect. The presence of asbestos in the home at the time negotiations for purchase were underway was one of what would have been many deal breakers if it had been known

to GREG HALL. If asbestos had ever been present, GREG HALL would not have purchased the home.

### **III. TOXIC OR DANGEROUS MOLD....**

Most items addressed by HEINLEIN in this section are already addressed in GREG HALL's Initial Brief. GREG HALL disagrees with HEINLEIN's argument. See Initial Brief of Appellant and record citations contained therein, pages 18 -26.

Two new matters raised by HEINLEIN are the assertion that GREG HALL never raised Curry's engineer status and other theories [which HEINLEIN fails to identify] in the Court below as a basis for CURRY's expertise and that GREG HALL can testify to his medical symptoms. This is incorrect. Please see Plaintiff's Response to Defendants' Motions in Limine. The theories under which Curry is an expert and under which GREG HALL can testify as to his medical symptoms are expressly raised in Plaintiff's Response to Defendants' Motions in Limine.

In addition, Plaintiff's [GREG HALL's] Brief in Opposition to the Defendants' Motions for Summary Judgment [to which affidavits of Curry were attached], GREG HALL asserted Curry's status as an engineer AND a contractor. See numbered paragraphs 35 through 37,m Curry Deposition citations set forth in the Plaintiff's [GREG HALL's] Brief in Opposition to

the Defendants' Motions for Summary Judgment and deposition citations contained in the Plaintiff's [GREG HALL's] Brief in Opposition to the Defendants' Motions for Summary Judgment.

#### **IV. MOLD ABATEMENT COSTS**

Once again HEINLEIN takes considerable liberty with his interpretation of the record. HEINLEIN quite incorrectly argues that because Curry said he was not qualified to perform mold abatement means that he cannot be qualified to testify as to what the costs of mold abatement are. This argument is tantamount to arguing that a surgeon is not qualified to read X-Rays or use them in surgery because he is not a certified radiologist. The question is whether he has sufficient knowledge, training or expertise to give expert or skilled testimony about the costs of mold abatement as opposed to actually performing it. Insurance adjusters provide analyses and estimates of costs of medical treatment and property damage on a daily basis, but they are not physicians or qualified body mechanics.

See applicable Rules of Evidence as follows:

##### **Rule 702. Testimony by experts.**

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

**Rule 703. Basis of opinion testimony by experts.**

The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Curry clearly set forth knowledge, skill, experience, training, and education which would qualify him to give opinions as the costs of mold abatement. See Curry Deposition, pages 1-9, 11, 34 [lines 19-24]45-52, 65-67 and 74-76. See also the Affidavit of Scott Curry in Opposition to Summary Judgment and the Supplemental Affidavit of Scott Curry in Opposition to Summary Judgment.

Mr. Curry has not tried to change his deposition testimony at all. The failure of HEINLEIN or other Defense Counsel to fully develop the knowledge and testimony of a Plaintiff's expert does not equate to a change in testimony when the expert provides additional testimony that supplements and/or explains earlier testimony.

*Kaseta v. Northwestern Agency of Great Falls, MT* 1992, 252 MT 135, 827 P.2d 804 cited by HEINLEIN is not applicable to the facts of the instant case. Even a quick perusal of *Kaseta*, supra, reveals that *Kaseta* at

one time opined a value of a building at one figure and subsequently *without explanation*, changed his figure for the purpose of creating an issue of fact. Further, Kaseta was himself a party, not an expert witness. In any event, Curry did not change his testimony about knowledge of mold abatement costs. He was not asked that.

Similarly, HEINLEIN's reliance upon *Van T. Jenkins & Associates, Inc. v. US. Industries, Inc.*, 736 F.2d 656 (11<sup>th</sup> Cir. 1984) is misplaced. In *Van T. Jenkins & Associates*, the Plaintiff testified that he was not told something and subsequently produced an affidavit saying he was and the Court stated:

\*\*\*\*\*Plaintiff affirmatively stated on deposition that defendant's representatives did not tell him that he would become a dealer if he signed the purchase contract and informed him there was a review board to screen dealership applicants. However, in opposition to defendant's motion for summary judgment, plaintiff produced an affidavit testifying to the contrary.\*\*\*\*\*

HEINLEIN cites no statement by Curry that he had no experience or expertise in mold abatement or the costs to perform them. In fact, Curry cited many instances where he was involved in exactly that endeavor. See deposition cites supra.

## **V. IMPUTED KNOWLEDGE OF DONNA HALL**

HEINLEIN fails to note that his agent CERNICK advertised in writing that house had “oil fuel” and “hot water heat”. See MLS Listing - Deposition Exhibit 4, Cernick Deposition, page 18, Lines 22-25.

HEINLEIN asserts on page 128 of his brief that GREG HALL does not appeal from the Order Granting Summary Judgment with reference to the damages related to the furnace and sewer issues. This assertion is not only false, it is ridiculous. The Order Granting Summary Judgment is one of two Orders expressly appealed from in this cause and attached as Tabs in the Appendix to Appellant’s Initial Brief. Further, HEINLEIN himself states that GREG HALL has appealed this order [see page 3 of HEINLEIN’s brief], and these issues are addressed in Appellant’s Initial Brief including without limitation on pages 6-8. HEINLEIN’s statement is simply false.

## **VI. FAILURE TO PLEAD FRAUD WITH PARTICULARITY**

GREG HALL adopts his arguments in his Initial Brief.

## **VII. HOMEOWNER KNOWLEDGE OF DEFECTS**

HEINLEIN seems to assert that he did not know of defects or adverse material facts and complains that GREG HALL failed to put on any evidence that City of Libby water department employees advise HEINLEIN

of leaks in water and sewer. This, again, is untrue. HEINLEIN himself admitted to contacting the City of Libby about these issues.

HEINLEIN and CERNICK had actual knowledge of many adverse material facts. For instance, HEINLEIN told CERNICK that the oil boiler furnace did not work and had been disconnected. (Heinlein Deposition page 21.), CERNICK knew that the furnace had leaked water in the house and that the furnace had been disconnected. (Cernick Deposition page 33.) HEINLEIN knew that sewage had backed up into the house, HEINLEIN knew that there was a sound of water running to the extent that he talked to the City of Libby about it and the sewage issue (Heinlein Deposition, pages 48 and 49), and HEINLEIN felt it was their problem. Despite this knowledge, CERNICK represented and advertised the home as having "oil fuel" and "hot water heat." She also represented and advertised the home having "new windows" and was "ready to live in." (MLS Listing - Deposition Exhibit 4, attached hereto as Exhibit A.) CERNICK representations and advertising were patently false and misleading. HEINLEIN admits that he believes he saw the advertisement in the local newspaper. (Heinlein Deposition page 21), but did nothing to correct the false advertisement. HEINLEIN even admits that persons should not be allowed to be exposed to raw sewage, (Heinlein Deposition, Page 59). This

is not a case of a homeowner not realizing something about his home was a defect or adverse material fact. This is a clear case of a homeowner failing to disclose material adverse information that a reasonable buyer would consider in determining whether to purchase the home. The Montana Supreme Court has held on many occasions that this sort of conduct gives rise to liability. *Mattingly v. First Bank of Lincoln* (1997), 285 Mont. 209, 219, 947 P.2d 66, 72, *Russell v. Russell* (1969), 152 Mont. 461, 452 P.2d; *Poulsen v. Treasure State Industries, Inc.* (1981), 192 Mont. 69, 626 P.2d 822; and *Moschelle v. Hulse*, 190 Mont. 532, 622 P.2d 155 (1980).

### VIII. CONCLUSION

For the reasons set forth above and the reasons set forth in Appellant's Initial Brief, the District Court erred in granting the Motions in Limine. It applied incorrect legal standards in determining whether Scott Curry could testify as an expert on mold issues and standards of care of real estate professional. He was qualified to give such testimony as stated with particularity in the Argument sections of this Brief. Similarly, the District Court applied incorrect legal standards to the testimony of Greg Hall. Montana Rules of Evidence 401, 701 and 704 all support Greg Hall's right to testify about his medical conditions vis a vis the mold in the house. The

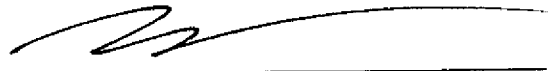
Order Re: Defendants' Motions in Limine must be reversed and this cause remanded to the District Court for further proceedings and trial.

In addition, the District Court's legal and factual rulings were in error with respect to the Summary Judgments granted. Summary Judgment is *not proper* where there are disputed issues of fact. *Brohman v. State of Montana*, (1988), 230 Mont. 198, 749 P.2d 67. Summary judgment is not a substitute for trial by jury, *Brohman, supra*. As shown by the somewhat lengthy argument above, there were genuine issues of material fact to be tried. The District Court made numerous improper legal conclusions and contradictory findings to grant the summary judgments. The Order Granting Summary Judgment must be reversed and this cause remanded to the District Court for further proceedings and trial.

**IX. Certificate of Compliance with Rule 11, Mont.R.App.P.**

I hereby certify that the foregoing brief exclusive of the exclusions of Rule 11(4)(d), Mont. R.App.P. is proportionately spaced, utilizes a Times New Roman 14 point typeface, and consists of 14 pages and 1826 words according to the word processor's counting function.

Respectfully submitted this 31<sup>st</sup> day of July, 2010.



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**Certificate of Service**

I certify that on July 31, 2010 a true and correct copy of the foregoing was mailed to:


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